

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**Appeal from the Court of Appeals
Richard A. Bandstra, C.J.**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

Supreme Court No. 120899

v.

Court of Appeals No. 237337

DENNIS MICHAEL PERKS,

Livingston County

Circuit Court Case No. 99-10823-FH

Defendant/Appellant.

APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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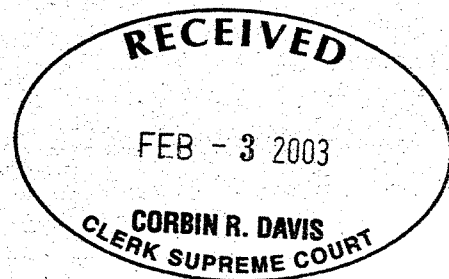


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COUNTER-STATEMENT OF JURISDICTIONAL BASIS

The People concur in Defendant's Statement of Jurisdiction. Jurisdiction before this court is also proper pursuant to MCL 770.3(6).

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COUNTER-STATEMENT OF QUESTION INVOLVED

I. Did the Court of Appeals properly hold that an appeal of right does not exist for a sentence imposed after a contested probation violation hearing where the underlying conviction is based upon a plea?

The Court of Appeals answers: Yes

The People answer: Yes

Defendant/Appellant answers: No

COUNTER-STATEMENT OF FACTS

The People concur in Defendant's Statement of Facts.

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ARGUMENT

I. THE COURT OF APPEALS PROPERLY HELD THAT AN APPEAL OF RIGHT DOES NOT EXIST FOR A SENTENCE IMPOSED AFTER A CONTESTED PROBATION VIOLATION HEARING WHERE THE UNDERLYING CONVICTION IS BASED UPON A PLEA.

Standard of Review and Issue Preservation

The People concur in Defendant's statement of the Standard of Review and Issue Preservation.

Discussion

The order entered by the Court of Appeals denying Defendant's claim of right is direct and to the point. Each statement of fact is accurate and its legal conclusion that Defendant has no *right* to appeal directly and logically follows.

Defendant's conviction of the underlying crimes arose by virtue of a no contest plea to crimes committed after December 27, 1994. Thus, his conviction is not appealable by right, but only by application. Mich Const, art 1, section 20; MCL 600.308(2)(d); MCL 770.3(1).

Defendant subsequently violated his probation and his probation was revoked after a contested hearing. As this Court recently held in *People v Kaczmarek*, 464 Mich 478, 482-483; 628 NW2d 484 (2001), "violation of probation is not a crime, and a ruling that probation has been violated is not a new conviction." Accordingly, as held by the Court of Appeals "[i]f a determination of probation violation is not the conviction of a crime, then a judgment imposed after such a determination must be based on the underlying crime. Since the judgment is based on the plea to the underlying crime, the appeal must be by leave." 13a, Defendant's-Appellant's Appendix.

1. The Constitution Restricts Appellate Rights Of Defendants Convicted By Plea.

Determination of the proper scope of Defendant's appellate rights depends upon the applicable constitutional and statutory provisions. Accused persons previously enjoyed a constitutional right to appeal. The 1994 adoption of Proposal B by the people marked a significant restriction on the right to appeal from a criminal conviction:

In every criminal prosecution, the accused shall have the right ... to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court.

Mich Const, Article 1 Section 20.

The rules of constitutional construction are well-established. "The first rule requires that the interpretation given the provision be the sense most obvious to the common understanding; the one that reasonable minds, the great mass of people themselves, would give it." *House Speaker v Governor*, 443 Mich 560, 576; 506 NW2d 190 (1993). This rule has been articulated best by Justice Cooley:

A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, [t]he intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, [b]ut rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.

In re Proposal C, 384 Mich 390, 405; 185 NW2d 9 (1971)(internal citation omitted). The second rule "requires consideration of the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished." *House Speaker*, at 580. As this Court recognized in *People v DeJonge*, 442 Mich 266, 274-275; 501 NW2d 127

(1993), these rules are

indispensible because the literal construction of the words, without regard to their obvious purpose of protection, is to make the constitutional safeguard no more than a shabby hoax, a barrier of words, easily destroyed by other words. ... ***A constitutional limitation must be construed to effectuate, not to abolish, the protection sought by it to be afforded.***

(Emphasis added).

Starting with the language of the Constitution, Section 20 explicitly defines a class of persons with specifically defined rights. It starts with a broad class of persons in “every criminal prosecution.” Nowhere is the term “criminal prosecution” defined. This Court has stated that a probation violation is not a stage of a criminal prosecution. *See People v Rial*, 399 Mich 431, 435; 249 NW2d 114 (1976). But that statement was made solely in the context of rejecting a claim that the standards of accepting an admission to a probation violation should be similar to those imposed for a guilty plea to a criminal violation. The *Rial* court was not construing the Constitution, and thus was not employing the standards of construction applicable to the Constitution, i.e., according to the common sense of the people who ratified it. To the people who ratified the Constitution and adopted Proposal B, the term “criminal prosecution” would clearly include a proceeding where the Prosecutor represents the People, with a defendant who was convicted of a crime and has a constitutional right to counsel, and where the potential outcome of the proceeding is that the defendant can be sent to prison for a long term of incarceration. Even this Court and the Legislature recognize that a probation violation is part of a criminal prosecution. For example, the Legislature has codified statutes governing probation violations in Chapter 9 of the Code of Criminal Procedure. This Court has promulgated rules governing probation violations in Chapter 6 of the Michigan Court

Rules under “Criminal Procedure.” Probation violations are not civil proceedings, probate proceedings, appellate proceedings, or any other label that might be applied to a judicial matter. It defies common sense to suggest that a probation violation proceeding is *not* part of a criminal prosecution.

Of the players in a “criminal prosecution” the Constitution focuses on the “accused.” It then creates two sub-classes of those who are “accused.” By specific reference it distinguishes those “who plead[] guilty or nolo contendere” from the remainder who are accused and have been convicted after a trial.¹ Section 20 further specifies what rights each class shall possess. Those “accused” persons who do not fall within the class of those who have pled guilty or nolo contendere, i.e., those convicted after trial, shall enjoy a right to appeal. Those accused persons who have tendered such a plea shall have restricted rights: “an appeal ... shall be by leave of the court.”

Defendant falls within the class of persons who tendered a guilty or nolo contendere plea. **His subsequent appellate rights are defined by that status.** As this Court recognized in *Kaczmarek*, a probation violation is not a separate crime. *Kaczmarek*, 482-483. *See also Kaczmarek*, 487 (dissenting opinion of C.J. Corrigan). No statute or case law suggests otherwise.² Nor is the probation violation a *separate* “criminal prosecution” which allows

¹Those persons “accused” who are not convicted, by plea or otherwise, have no concern with post-conviction remedies.

²MCL 750.5 defines a “crime” as “an act or omission forbidden by law which is not designated as a civil infraction, and which is punishable upon conviction by any 1 or more of the following: (a) Imprisonment. (b) Fine not designated a civil fine. (c) Removal from office. (d) Disqualification to hold an office of trust, honor, or profit under the state. (e) Other penal discipline.” *See also* MCL 750.6 (“A crime is: 1. A felony; or 2. A misdemeanor.”)

Defendant to redefine his status, and thus his appellate rights, by pleading guilty or having a hearing. All the probation violation does is “clear[] the way for a resentencing on the original charge.” *Id*, 483.

There is no ambiguity in the Constitution. Defendant’s rights are defined by his status as an accused who pled guilty or nolo contendere. Contesting allegations of a probation violation do not alter that status.³

This Court previously addressed the rationale behind Proposal B in *People v Bulger*, 462 Mich 495; 614 NW2d 103 (2000). *Bulger* involved the extent of the right to counsel for guilty plea appeals and required this Court to examine the basis behind Proposal B. The amendment was specifically viewed as a means to reduce the case load of the Court of Appeals. *Id*, at 503-504 citing Note, *Limiting Michigan’s Guilty And Nolo Contendere Plea Appeals*, 73 U Det Mercy L Rev 431 (1996). It was further observed by at the time that “[t]here is no question the public does not understand why there should be a high volume of appeals where a person has admitted his or her guilt. Most of these appeals are really sentence appeals.”⁴ Webster, *Introduction to the Report of the Task Force on Appellate Courts*, 72 Mich B J 895, 896 (1993). The amendment sought to reduce appellate caseloads by restricting

³The People recognize and accept the implication of this analysis that an accused who is convicted after a trial would enjoy a *right* to appeal his probation revocation, whether he contested the allegations at a probation violation hearing or pled to the allegations. An accused who *had* a trial would have his appellate rights determined by that status.

⁴In reviewing Defendant’s objections to his probation violation, it becomes apparent that his real concern is the fact that a six year minimum sentence was imposed where the guidelines on the underlying offense at the time of sentencing were 6-12 months. See *People v Dennis Perks*, Application for Leave to Appeal at 12 (Michigan Supreme Court, Application filed on or about January 17, 2003). This case is, in substance, a sentencing appeal.

appeals by right to those who were convicted at trial.

In light of the language of the amendment and the circumstances surrounding its adoption, if any question exists about the extent to which a defendant's appellate rights are limited, this Court should favor a construction limiting those rights.

2. Legislation Implementing The Constitution Restricts Appellate Rights Of Defendants Convicted By Plea.

To implement Proposal B, the Legislature amended MCL 600.308(2)(d) and MCL 770.3(1). Like the Constitution, these statutes recognize two separate classes of convicted defendants: those who pled and those who had a trial. It did not recognize or create any other class.

Public Act 375 of 1994 amended MCL 600.308 to provide:

(1) The court of appeals has jurisdiction on appeals from the following orders and judgments which shall be appealable as a matter of right:

(a) All final judgments from the circuit court, court of claims, and recorder's court, *except* judgments on ordinance violations in the traffic and ordinance division of recorder's court and *final judgments and orders described in subsection (2)*.

...

(2) The court of appeals has jurisdiction on appeal from the following orders and judgments which shall be reviewable only upon application for leave to appeal granted by the court of appeals:

...

(d) A final order or judgment from the circuit court or recorder's court for the city of Detroit *based upon a defendant's plea of guilty or nolo contendere*.

(e) Any other judgment or interlocutory order as determined by court rule.

(Emphasis added). Public Act 374 of 1994 amended MCL 770.3:

(1) Subject to the limitations imposed by section 12 of this chapter and except as provided in section 16, an aggrieved party shall have a right of appeal from

a final judgment or trial order as follows:

(a) Except as otherwise provided in subdivision (d), in a felony or misdemeanor case tried in the circuit court, there shall be a right of appeal to the court of appeals.

...

(d) All appeals from final orders and judgments *based upon pleas of guilty or nolo contendere* shall be by application for leave to appeal.

(Emphasis added).

Like the Constitution, these statutes are clear and unambiguous. As the Court of Appeals held in denying a right to appeal, the revocation of probation is “based upon” the plea to the underlying felony charges. A conviction is a necessary predicate to any probation violation. The hearing is not a separate criminal proceeding. In fact, the Legislature has emphasized the summary nature of probation revocation proceedings, and recognized that probation is not intended to confer additional rights on a defendant:

It is the intent of the legislature that the granting of probation is *a matter of grace conferring no vested right to its continuance*. If during the probation period the sentencing court determines that the probationer is *likely again to engage in an offensive or criminal course of conduct or that the public good requires revocation of probation, the court may revoke probation*. All probation orders are *revocable in any manner the court that imposed probation considers applicable either for a violation or attempted violation of a probation condition or for any other type of antisocial conduct or action on the probationer's part for which the court determines that revocation is proper in the public interest*. Hearings on the revocation shall be *summary and informal* and not subject to the rules of evidence or of pleadings applicable in criminal trials. ... *The method of hearing and presentation of charges are within the court's discretion*, except that the probationer is entitled to a written copy of the charges constituting the claim that he or she violated probation and to a probation revocation hearing. The court may investigate and enter a disposition of the probationer *as the court determines best serves the public interest*. If a probation order is revoked, the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made.

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MCL 771.7 (emphasis added).

Exploring the fundamental difference between convictions obtained by trial and convictions obtained by pleas, this Court explained why limited appellate rights following a guilty plea still provide meaningful access to the appellate courts:

Plea proceedings are also shorter, simpler, and more routine than trials; the record most often consists of the "factual basis" for the plea that is provided to the trial court. In contrast with trials, less danger exists in plea cases that the record will be so unclear, or the errors so hidden, that the defendant's appeal will be reduced to a meaningless ritual.

Bulger, 516. This analysis is equally applicable to probation violation hearings. They are clearly "shorter, simpler, and more routine than trials." In fact, the probation violation statute *mandates* that the proceedings be "summary and informal." The record often consists of nothing more than the testimony of a probation officer.⁵ The legal issues involved are minimal as the probation violation statute precludes application of the rules of evidence. Furthermore, none of the legal issues involved in a trial proceeding are relevant in the probation violation proceeding. Even the sentencing process is much simpler and less susceptible to error as there are no issues of guidelines or departures or substantial and compelling reasons.⁶ The danger of hidden errors and complicated legal issues which exist in the trial arena simply are not concerns in the context of a probation violation hearing.

⁵Even the hearing in this case, which was highly unusual in that it involved the testimony of a probation officer, two police officers, and two civilian witnesses by the People, along with Defendant and one civilian defense witness, only lasted an hour and a half. *See People v Dennis Perks*, Appendix G to Application for Leave to Appeal filed on or about January 17, 2003.

⁶*See, e.g., People v Peters*, 191 Mich App 159, 167; 477 NW2d 479 (1991)(judicial guidelines do not apply to probation violations). *See also* MCR 6.445(G)(absent from the list of court rules which the court must follow in imposing a sentence after a probation violation is MCR 6.425(D)(1), which requires that the guidelines be used).

A court's jurisdiction to impose sentence flows from a finding that a defendant is guilty of a crime, whether that finding arises by a plea or trial. The *nature* of how the conviction arises determines the scope of a defendant's appellate rights. Nothing that happens *after* the plea or trial changes how the conviction arose. It can only be one or the other, but not both. Yet Defendant asserts that it *can* be both. In this case, Defendant tendered a plea. At that point, there can be no doubt or dispute that his appellate rights were limited to filing an application for leave. At the time of his sentencing, he was advised of his limited appellate rights. Somehow, according to Defendant, an informal hearing at which the trial court revoked probation magically converts a conviction based upon a plea to a matter that is appealable by right. It seems perverse to think that someone who has admitted committing a crime, is granted probation "as a matter of grace," and who then flouts the courts' grace by violating probation should be deemed to have elevated appellate rights without constitutional or legislative authority. Had the court simply imposed at sentencing the sentence ultimately imposed after the probation violation, *Defendant would not have been entitled to an appeal of right at that point*. Receiving a break at the initial sentencing should not work to the benefit of a defendant by converting his appeal by leave to an appeal by right simply by virtue of having a short, summary, informal probation violation hearing.

To the extent any ambiguity in the statutory language exists, reference must be made to the constitutional provision which compelled it. The constitutional language is specific and clear that appellate rights depend on which class of accused persons to which a defendant belongs. This Defendant belongs to the class of accused persons whose conviction arose by plea. His limited appellate rights flow from that status.

3. The Court Rule Contravenes The Constitutional And Statutory Restrictions On Appellate Rights.

Against the constitutional and statutory framework set forth above, this Court adopted an amendment to MCR 6.445 in 1998. 459 Mich cxcviii (1998). As amended, the rule governs three sets of circumstances for the advice of appellate rights following sentencing after a probation violation:

1. A defendant has a right to appeal a sentence of incarceration after “a contested hearing,”⁷ MCR 6.445(H)(1)(a);
2. A defendant is entitled to file an application for leave to appeal a sentence of incarceration “if the conviction was the result of a plea of guilty,” MCR 6.445(H)(1)(b); or
3. A defendant is entitled to file an application for leave to appeal a sentence other than incarceration.⁸ MCR 6.445(H)(2).

The rule amendment purported to simply implement Proposal B. 459 Mich cxcviii, cxcix (1998)(staff comment); *Kaczmarek*, 485. Despite its professed intent, the rule contradicts the constitutional and statutory scheme limiting appellate rights based on the source of a defendant’s conviction.

The language of the constitutional amendment is comprehensive. Inclusion of the phrase “as provided by law” in its description of appellate rights delegates the entire job of implementation of Proposal B to the Legislature alone. No role exists for utilization of this

⁷This terms appears to mean the hearing at which a probationer has a right to contest the violation referred to MCR 6.445(B)(2)(a).

⁸This provision draws no distinction whatsoever to whether the conviction was by plea or trial, or whether the “conviction” of the probation violation was by plea or hearing.

Court's rulemaking powers. *Bulger*, 508-509 (use of phrase "provided by law" precludes judicial rulemaking powers). Thus, the court rule cannot by rule provide an appeal of right broader than that specified by the Constitution and the Legislature. *Compare Bulger*, 510 ("this Court could not use its rulemaking powers to provide for appointed appellate counsel absent legislative action.")

Defendant asserts that he has a right to appeal from the sentence imposed after a probation violation hearing based on what this Court did *not* do in *Kaczmarek*. Specifically, according to Defendant, since the Court did not hold that MCR 6.445(H) was invalid, nor take any action to change MCR 6.445(H), judicial silence on this issue is a judicial decision that a right to appeal exists.⁹ Such a claim is nonsense. *Cf Donajkowski v Alpena Power Company*, 460 Mich 243, 258-262; 596 NW2d 574 (1999)(rejecting legislative acquiescence as a tool of statutory construction). No conclusion can be drawn from action this Court *didn't* take.

Kaczmarek did not *specifically* hold that MCR 6.445(H) was invalid; it did so indirectly by holding that the amendment to the court rule could not contravene a clearly established right that existed by virtue of the Constitution and statute. In fact, read analytically, *Kaczmarek* stands for precisely the proposition that the People urge in the case

⁹Defendant also suggests that since the Court did not overrule the holding of *People v Pickett*, 391 Mich 305; 215 NW2d 695 (1974) that a revocation of probation is a "final judgment" that this somehow implies a right of appeal in this case. *Pickett* simply granted a probationer appellate rights upon a revocation of probation, where previously there were none. The holding in *Pickett* does not need to be overruled to limit appeals by right to those who were convicted at trial. Since all appeals of convictions were by right at the time *Pickett* was decided, it was simply irrelevant in that case whether the conviction occurred by plea or trial or whether the probation revocation came by plea or after a contested hearing.

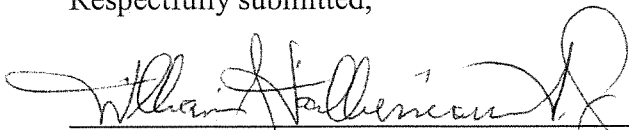
at bar: that a court rule cannot abrogate a constitutional mandate. In *Kaczmarek*, the defendant pled guilty to a probation violation under the amended, and now current version of MCR 6.445(H). By its terms, the court rule, which did not limit its effectiveness to cases arising under Proposal B, barred an appeal of right by the defendant. See *Bulger*, 488 (dissenting opinion of C.J. Corrigan)(“nothing in the language of the governing court rule makes the date of the underlying crime the triggering event in determining appellate rights following probation violations.”) But this Court nonetheless held that the court rule “cannot be used to dismiss a claim of appeal properly filed under the constitution and the implementing legislation.” *Bulger*, 485. Without specifically saying so in *Kaczmarek*, this Court implicitly applied *Bulger* and recognized that it cannot use its rulemaking authority to contravene the constitution and the implementing legislation.

The People urge the converse of the rule of *Kaczmarek*: the court rule cannot be used to *provide* a claim of appeal where under the constitution and the implementing legislation one does not exist.

RELIEF REQUESTED

FOR THE FOREGOING REASONS, the People request that the Court AFFIRM the order of the Court of Appeals.

Respectfully submitted,



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Dated: January 31, 2003

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